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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,

Respondents.

BRIEF OF TRANS WORLD AIRLINES, INC., OPPOSING CERTIORARI PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Trans World Airlines, Inc., urges the denial of certiorari, permitting the termination of this ten-year litigation. The petitioner union, representing in excess of 6,000 flight attendants of TWA, seeks to invalidate (1) a settlement agreement, approved by both lower courts, that compromises a class action brought against TWA in 1970 under Title VII of the 1964 Civil

Rights Act and (2) an allowance of retroactive occupational seniority to employees who are to be reinstated under the agreement. The objection to the seniority allowance does not involve TWA because the settlement agreement provides that seniority is to be determined by the district court "in its discretion ... without contest or objection by TWA" (App. 21a).[1] But TWA strongly opposes the union's attack on the district court's subject matter jurisdiction that would destroy the whole settlement.

The union's contention is that the district court had no jurisdiction to approve the settlement of the Sub-class B claims which the court of appeals had held were barred by a jurisdictional time limit of Title VII. The union concedes (pet. p. 9 n11) that the claims of Sub-class A members, who had been held to have complied with the time limit, were within the court's jurisdiction to approve the settlement. As this brief shows, the union's argument is wrong in legal principle and would have bad practical results.

Three background facts are significant.

1. This Court denied review of a similar settlement approval in a companion case, *ALSSA* v. *American Airlines*, 573 F. 2d 960 (7th Cir.), *cert. den.* 439 U.S. 876 (1978). The union contends that the *American* case conflicts with a decision in *McArthur* v. *Southern Airways, Inc.*, 569 F. 2d 276 (5th Cir. 1978), and differs from the present *TWA* case. As this brief shows, the *McArthur* case in the Fifth Circuit differs from both the *American* and this *TWA* case.

2. If the union's objection to the settlement approval order were sustained, this Court could be required to consider the review of the related Seventh Circuit decision which held that TWA's pregnancy practice was unlawful sex discrimination under Title VII and that the Sub-class B class members had not complied with the jurisdictional time limit of Title VII. *In Re*

[1] The citations "App.____" in this brief are to the appendix in the union's petition for certiorari.

Consolidated Proceedings in the Airline Cases, 582 F. 2d 1142, became final on January 11, 1979 on denial of rehearing. After petitions for certiorari were filed here in Nos. 78-1545 and 1549, the parties entered into settlement negotiations in May 1979, and this Court on June 4, 1979 deferred consideration of the certiorari petitions on the joint motion of the parties. The settlement agreement now attacked by the union was entered into on June 18, 1979. It settled all issues in the litigation and provided for dismissal of the certiorari petitions when the settlement approval order is no longer subject to review or modification. This final event will occur if this Court denies the union's certiorari petition in No. 80-951. The parties will then be required to dismiss the petitions in Nos. 78-1545 and 78-1549. And they can then carry out the settlement agreement and terminate the litigation begun in 1970. If certiorari is granted for review of the settlement approval order, the reasons for deferring consideration of the petitions in Nos. 78-1545 and 78-1549 will continue to exist until this Court's final decision in this certiorari proceeding.

3. The union's contentions would result in the disapproval of the settlement on an issue that has greatly protracted this litigation. TWA abandoned in 1970 the practice that was the cause of the litigation. The *failure* of a 1971 settlement to provide retroactive occupational seniority for terminated flight attendants was the issue on which the settlement approval was overturned years ago. *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (1973), *cert. den.* 416 U.S. 993 (1974). The 1971 settlement would have put the class plaintiffs back to work at that time and given them work in the intervening years, although only with the seniority of their termination. Now the *allowance* of retroactive seniority in the 1979 settlement agreement is the union's reason for seeking to overturn it. It would be a misfortune if the dispute over the issue of seniority were to prevent the compromise of larger issues. The contested issue of time requirements in this litigation was discussed by the court of appeals as follows (App. 7a-8a):

The uncertainty of the outcome on this issue before the Supreme Court was considered by the district court to be a major factor leading the parties to reach this settlement, to avoid "the plaintiff class and T.W.A. being forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk."

The facts are clarified by a chronology of the major relevant events in the litigation:

1970	Flight attendants' union filed separate but companion Title VII class actions against American Airlines and Trans World Airlines attacking rule terminating flight attendants on pregnancy (Aug.).
	Pregnancy rule eliminated by both airlines (Oct.).
1971-1974	Settlement agreement providing return to work without back pay or retroactive seniority was set aside by court of appeals' reversal of district court approval order. *ALSSA* v. *American Airlines,* 490 F. 2d 636, *cert. den.* 416 U.S. 993 (May 1974).
1976	Summary judgments were entered against American (Apr.) and TWA (Oct.), each holding Title VII was violated by airline and Title VII time limit was complied with by plaintiffs.
1977	Joint American-TWA brief on appeal was filed in Seventh Circuit (May).
	Settlement between class plaintiffs and American was negotiated and approved in District Court (Aug.-Sept.).
1978	TWA's appeal from summary judgment and union's appeal from American settlement approval was argued in court of appeals (Jan.).
	Approval of American settlement was affirmed. *ALSSA* v. *American Airlines,* 573 F. 2d 960 (March), *cert. den.* 439 U.S. 876 (Oct.).

Court of Appeals affirmed summary judgment of violation of Title VII by TWA, but Sub-class B plaintiffs were held to have failed to comply with Title VII time limit. *In Re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F. 2d 1142 (Aug.). App. 40a-58a.

1979 Court of appeals denied petitions for rehearing (Jan.).

Plaintiffs filed certiorari petition No. 78-1545, and TWA filed cross certiorari petition No. 78-1549 (Apr.).

On motion of parties, Supreme Court deferred ruling on certiorari petitions because of settlement negotiations (June 4).

Settlement agreement was entered into (June 18) between plaintiffs and TWA, reinstating class members as flight attendants; TWA agreeing to pay $1,500,000 to Sub-class A members (held to have complied with time limit) and $1,500,000 to much larger Sub-class B (held not to have complied with time limit); and providing for seniority to be determined by court in its discretion without contest or objection by TWA. App. 23a-39a.

Union granted leave to intervene (July 19).

District court entered (1) an order approving settlement as fair, reasonable and adequate, dismissing actions, and (2) an order awarding retroactive seniority to employed class members (Nov. 9). App. 16a, 18a.

1980 On union appeal, court of appeals affirmed orders approving settlement and granting seniority (June). App. 1a.

Court of appeals denied union petition for rehearing (Sept.). App. 11a.

Union's certiorari petition filed (Dec. 13).

SUMMARY OF ARGUMENT

Litigation can be settled while subject matter jurisdiction is in dispute. When the order approving the settlement is no longer subject to court review, the court of appeals' non-final decision will become moot.

Judicial and Congressional policies favor the compromise settlement of Title VII cases, particularly where the outcome of the jurisdiction issue is in doubt. These policies are stronger than the union's rigid jurisdictional theory.

Previous court approval of a similar settlement in a companion case supports approval of this settlement. There is no conflict between the circuits.

REASONS FOR DENYING CERTIORARI

The district court and court of appeals were clearly right in rejecting the union's jurisdictional attack on the settlement. Several preliminary matters emphasize the practical as well as theoretical reasons for denying certiorari.

A central consideration now is the settlement of this protracted litigation. The backpay claims of the Sub-class B members, rejected by the court of appeals for noncompliance with the jurisdictional time limit, cover more than ten years at annual rates of at least $7,500, amounting to an exposure of over 30 million dollars. Those claims were settled for 1.5 million plus return to work and trip passes for non-returning class members (App. 32a). When the settlement was agreed to, the issues of TWA's liability and of class plaintiffs' noncompliance with the jurisdictional time limit were still in dispute in the certiorari petitions (Nos. 78-1545 and 1549) filed in the Supreme Court. The union representing current employees was permitted, under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), to intervene and demonstrate, if it could, that the allowance of seniority would have "unusual adverse impact" on current employees and should be denied. The settlement resolved substantial issues, contested by the parties since 1970, in the practical interest of re-employing the plaintiffs and terminating the litigation and TWA's large financial risks.

The description of the court of appeals decision in the union's petition (7-8) omits a crucial factor. The court of appeals explained that the issue of subject matter jurisdiction over Sub-class B claims had not been "settled with finality" since the court of appeals' decision was pending before this Court at the time of the settlement (App. 7a). A reversal of the court of appeals ruling by the Supreme Court would mean that there was complete subject matter jurisdiction. The issue thus presented is not, as the union repeatedly represents, whether

there can be a settlement when subject matter jurisdiction is irreversibly held to be lacking. The question is whether litigation can be settled while subject matter jurisdiction is in dispute. This issue, not faced in the union's petition, materially differentiates *McArthur* v. *Southern Airways, Inc.*, 569 F. 2d 276 (5th Cir. 1978), which the union petitioner claims to be a conflicting decision that justifies Supreme Court review.

The union's petition repeatedly states that the allowance of retroactive seniority violates its collective bargaining agreement with TWA. Many Title VII decisions have indicated that Title VII and the policies under it supersede the provisions of union agreements. See *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 447 (D.C. Cir. 1976); *U.S.* v. *N. L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

The union seeks priority for litigation over settlement by contending (pp. 16-17) that the Court should grant certiorari in this No. 80-951 and decide the district court's jurisdiction over the claims of the Sub-class B members. This issue is before the Court in the pending certiorari proceeding of the Sub-class B members in No. 78-1545 but where, under the Court's order of June 4, 1979, consideration of the issue is held in abeyance because of the settlement. The union would have the Court disregard the stay order in No. 78-1545 and hold up consideration of the settlement approval order in this No. 80-951. This result would defeat the judicial policy in favor of settling litigation.

I.

DISTRICT COURT HAD JURISDICTION TO CONSIDER AND APPROVE SETTLEMENT.

Subject matter jurisdiction of this action against TWA is provided for by several statutory provisions. The complaint, alleging a class action under Title VII of the Civil Rights Act of 1964, stated that jurisdiction was invoked pursuant to four cited provisions of the United States Code. Complt. par. 1, I Supp. App. 7. One provision gives each district court jurisdiction of actions under Title VII. § 706(f) of Title VII, 42 USC 2000(e)-5(f). Another cited section, § 1343 (4) of the Judicial Code, gives district courts original jurisdiction of a civil action of the kind alleged in the complaint. Jurisdiction for consideration and approval of a settlement in a Title VII or other class action is provided by Rule 23(e) of the Federal Rules of Civil Procedure, stating that a class action shall not be "dismissed or compromised without the approval of the court". The contested issue of subject matter jurisdiction in this case is raised by the allegations of the complaint (par. 11) that the plaintiff union on June 1, 1970 had filed a charge with the Equal Employment Opportunity Commission alleging unfair employment practices and that the EEOC had notified the plaintiff it was entitled to initiate a civil action under Title VII. Section 706(d) of Title VII, which required such charges to be filed within 90 days after the occurrence of the alleged unlawful practice, is held to create a prerequisite of subject matter jurisdiction.[2]

These provisions constitute a jurisdictional foundation for the approval of the settlement of this class action under Title VII. Such a settlement is expressly encouraged by Congress in Title VII, which requires charges to be filed with the EEOC in the expectation that conciliation may dispose of the dispute.

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[2] See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *United Air Lines* v. *Evans*, 431 U.S. 553, 555 (1977).

§ 706(d). The reasons of public policy for such a settlement are based on the intention of Congress in Title VII. *Alexander* v. *Gardner-Denver,* 415 U.S. 36, 44, 59 (1974). *ALSSA* v. *American Airlines,* 455 F. 2d 101, 109 (7th Cir. 1972). While the statutory provisions for subject matter jurisdiction must be complied with, their effect is modified to an appropriate extent by the strong Congressional policy in favor of the settlement of actions under Title VII. On this ground alone, the district court's approval of the settlement should not be invalidated by the union's jurisdictional argument. This conclusion is supported by further analysis of the question of jurisdiction.

A. Court of appeals' non-final decision on lack of jurisdiction did not deprive district court of jurisdiction over the settlement.

The union's attack on the district court's jurisdiction overlooks the fact that the court of appeals' non-final decision of lack of jurisdiction will become moot and of no effect when the settlement is carried out. The settlement agreement provides that, upon approval of the settlement, the action will be dismissed in the district court and that the petitions for certiorari in the United States Supreme Court, held in abeyance during the settlement proceeding, will be dismissed immediately after the order of approval "becomes final and no longer subject to court review". App. pp. 25(a), 35 (a). Under the usual procedure of the Supreme Court, when litigation is settled after certiorari has been filed, the judgment of the court of appeals is vacated and the case is remanded to the district court to dismiss the appeal as moot. *J. Aron & Co.* v. *Mississippi Shipping Co.,* 361 U.S. 115 (1959); *U.S.* v. *Munsingwear, Inc.* 340 U.S. 36, 39 (1950). The purpose of this practice, it was explained, is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences" (340 U.S. at 41). Thus, the court of appeals' decision of lack of jurisdiction will become immaterial, without "any legal consequences", when the order approving the settlement is no longer subject to review.

The conclusion is clear. The court of appeals' to-be-vacated decision of lack of jurisdiction will not undercut the district court's jurisdiction to consider and approve the settlement.

B. Jurisdiction Over Sub-Class A Claims Provides Jurisdiction for Settlement.

The union concedes that the district court had jurisdiction to approve the settlement of the claims of Subclass A plaintiffs (pet. p. 9, n11). They were held by the court of appeals to have complied with the Title VII time limits. The provisions of the settlement agreement made up one intra-related package so that jurisdiction to consider settlement of the Sub-class A claims gave the court power to consider the Sub-class B claims. In a decision cited by the union (pp. 12-13) for the general principle of subject matter jurisdiction, the Seventh Circuit held that federal diversity jurisdiction existed for class claims under $10,000 if some of the claims individually satisfied the jurisdictional minimum. *Patterson* v. *Stovall,* 528 F. 2d 108, 112n5 (7th Cir. 1976).

C. Union's Rigid Jurisdictional Theory Not Applicable to Settlement of Title VII Class Action.

The union's petition cites cases (pp. 12-13) for the traditional results of lack of subject matter jurisdiction, as that jurisdiction may not be consented to or waived by the defendant, an action must be dismissed at once when lack of jurisdiction is found, any judgment in the action must be vacated, etc. So the union argues that, giving full effect to the Sub-class B members' failure to comply with the jurisdictional prerequisites of Title VII, the district court had no jurisdiction to approve a settlement that included their claims. The union's rigid argument overlooks the fact that *two policies of settlement and jurisdiction, as provided for by Congress in Title VII,* are involved and that the settlement policy is much stronger in this case.

Here the traditional judicial policy in favor of settlements is strengthened by the Congressional encouragement of settlements in Title VII cases, as noted above (p. 9), and by the provision for the settlement of class actions in Rule 23(e) of the Federal Rules of Civil Procedure. Rule 23(e) imposed a new requirement in stating that a class action shall not be dismissed or compromised without court approval. Other litigation is traditionally settled by the agreement of the parties, often without any court action except dismissal of the action pursuant to an unexplained stipulation. Whether the court dismissing the action lacks jurisdiction or whether lack of jurisdiction affects the settlement is of no consequence. In a class action the court's determination of approval depends on the reasonableness of the settlement. But lack of jurisdiction over the action being settled might have little or no effect on the court's jurisdiction to approve the settlement if the policy favoring settlements has priority.

The jurisdictional policy, which requires compliance with Title VII time limits in order to protect the courts from litigation over stale claims as noted above (p. 9), is not as strong as the union contends. It is true that time limit noncompliance excludes class members even when raised for the first time on appeal. *Wetzel* v. *Liberty Mutual Ins. Co.* 508 F. 2d 239, 248 n8 (3d Cir. 1975), *cert. den.* 421 U.S. 1011. But the principle's effect has been mitigated by permitting class members to be included in an EEOC charge filed by only one class member. *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 414 n8 (1975). Some decisions have held that equitable considerations excused noncompliance with time limits in Title VII and similar litigation. *Reeb* v. *Economic Opportunity Atlanta,* 516 F. 2d 924, 930 (5th Cir. 1975); *Dartt* v. *Shell Oil Co.,* 539 F. 2d 1256, 1261-2 (10th Cir. 1977), affirmed by equally divided court, 434 U.S. 99. And the courts long ago modified the very strict rule that a judgment is absolutely void if the court lacked subject matter jurisdiction. For practical reasons, courts have sometimes sustained such a judgment in the interest of the finality of court

decisions. *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940). See *Restatement of the Law, Second, Judgments*, Tentative Draft No. 6 (1979) 149-153.

Thus it is clear why the settlement policy has priority over that of jurisdiction. For in the instant case according to the court of appeals, the uncertainty of the outcome on the time limit issue "before the Supreme Court was considered by the district court to be a major factor leading the parties to reach this settlement" (App. 8a).

A class action settlement in a Title VII case can avoid very complex litigation created, as here, by the unusual jurisdictional prerequisites of Title VII. Since compliance with the filing prerequisites is necessary for subject matter jurisdiction, a great variety of disputed facts may be involved in the court's jurisdiction because of the circumstances of the claimed compliance. This is shown by the multitude of federal court decisions on the filing requirements.

It would be inconsistent with the purposes of Title VII and the strong judicial policy favoring settlements for the courts to hold that a disputed compliance with Title VII filing requirements cannot be settled because of their jurisdictional nature. The dispute over compliance would prevent the settlement of extensive litigation that might take years to resolve otherwise. The judicial policy against proceeding with litigation when subject matter jurisdiction may be lacking is clearly outweighed in this situation by the judicial policy that favors the settlement of Title VII cases.

The union argues that lack of jurisdiction for the settlement cannot be waived just as the employer cannot waive noncompliance with the jurisdictional prerequisites. However, the situations are not analogous. The strong judicial policy requiring subject-matter jurisdiction, by preventing waiver through failure to contest jurisdiction, is intended to reduce the burden of litigation as is the strong judicial policy favoring the settlement of disputes.

Here the conflict with strict jurisdictional theory is the policy of Congress and the courts that favors the compromise settlement of litigation, especially under Title VII. This practical settlement policy greatly outweighs in this case the policy behind the jurisdictional prerequisites of Title VII and refutes the union's contention that the settlement is invalid.

II.

AMERICAN AIRLINES SETTLEMENT DECISION SUPPORTS APPROVAL OF TWA SETTLEMENT, AND FIFTH CIRCUIT'S McARTHUR DECISION IS NOT IN CONFLICT.

The union contends that its jurisdictional contention is not contrary to *ALSSA* v. *American Airlines*, 573 F. 2d 960 (1978), *cert. den.* 439 U.S. 876, and is supported by *McArthur* v. *Southern Airways, Inc.*, 569 F. 2d 276 (5th Cir. 1978). Both cases were decided in March 1978. The losing union in *American* sought certiorari, which was denied, but certiorari was not sought in *McArthur*. The union misconceives the holdings in both cases, for the *TWA* decision involved here is supported by the *American* holding and does not conflict with the Fifth Circuit's decision in *McArthur*.

The court of appeals' opinion in the present case was right in saying, of the union's contention on jurisdiction, that the court had "rejected a similar claim in a lawsuit related to this case", citing the decision on the *American* settlement (App. 5a). The Title VII actions attacking the pregnancy practice of American and TWA for flight attendants were filed together on August 1, 1970. They were assigned to the same district judge. The *American* settlement, negotiated in August 1977, and that of *TWA*, negotiated in June 1979, have been described by the court of appeals as "similar" (*id.*). In the *American* case, as in the petition for certiorari in the *TWA* case, the petitioner union contended that the settlement could not be approved unless each plaintiff proved compliance with the jurisdictional time limit of Title VII. The major reliance of the unions in both

cases has been and is based on a statement in *United Airlines* v. *Evans*, 431 U.S. 553 (1977), that a discriminatory act not made the basis of a timely charge "is the legal equivalent of a discriminatory act which occurred before the statute was passed." See certiorari petition No. 77-1758, p. 6; petition in present case, pp. 11, 26.

The union's jurisdictional argument was rejected by the court of appeals in affirming the settlement in the *American* case, 573 F. 2d at 963. The opinion explained that the *Evans* holding about noncompliance with the time limit was not applicable because the court of appeals was "reviewing the propriety of a settlement and not a judgment rendered after a trial;" and that the issue raised by the union "should not be decided on the basis of Title VII law, but rather must be decided on the basis of legal principles regarding judicial review of settlement agreements." This Court denied the certiorari petition of the union in the *American* case in October 1978. 439 U.S. 876. The holding on the *American* settlement became a precedent for the negotiation of the *TWA* settlement entered into in June 1979.

The *McArthur* decision in the Fifth Circuit did involve charges of sex discrimination by flight attendants against an airline under Title VII and their failure to comply with the Title VII time limit. But the crucial facts and the jurisdictional principle involved were different from those in the *American* and *TWA* decisions in the Seventh Circuit as shown by a first *McArthur* opinion reported at 556 F. 2d 298. A class action was brought by twelve named plaintiffs, but they withdrew the class action allegations and entered into a consent decree with the defendant that would hire them back with full retroactive seniority in return for a complete dismissal of the action. Possible additional class members were thus excluded. The consent decree was used to evade the class action requirements of Rule 23 and the requirement of Rule 23(e) for court approval. In this first decision, the court of appeals ruled that the district court should proceed as under Rule 23(e) with

notice to class members and court consideration of the compromise. However, before the mandate issued, the Supreme Court's decision in *Evans* showed that none of the twelve plaintiffs had complied with the time limit requirement of Title VII. In the second opinion cited by the union, 569 F. 2d 276, the Fifth Circuit cut short the proceeding by directing the vacation of the consent decree for lack of jurisdiction.

Major differences between *McArthur* and the Seventh Circuit decisions in the *American* and *TWA* cases include:

1. All twelve plaintiffs in *McArthur* admitted that none had complied with the Title VII time limit. Their brief even conceded they would not have brought the action if *Evans* had been decided before they filed it. 569 F. 2d at 376, n. 3. In these *American* and *TWA* cases, compliance with the Title VII time limit remained in dispute at the time of the settlements and was one of the important issues that gave rise to the compromise.

2. The *McArthur* case was disposed of by a consent decree rather than, as in the *American* and *TWA* cases, by settlement agreement approved by the district court under Rule 23 (e). In practical substance, the distinction between such a settlement and a consent decree may often be of little significance. But here the difference is material when the strict theory of subject matter jurisdiction is sought to be applied by the union. A consent decree is actually an exercise of the subject matter jurisdiction alleged in the complaint. In the *American* and *TWA* cases the settlement approval will result in dismissal of the complaint so that the allegations of jurisdiction will not be given effect.

3. The *McArthur* case illustrates the possible abuse of class action settlements by the dismissal of the class suit allegations and a consent decree between named parties without the hearing and approval order required by Rule 23(e) and to the prejudice of unnamed class members.

The possibility of such an abuse was the reason for the requirement of court approval in Rule 23(e). *Norman* v. *McKee*, 431 F. 2d 769, 774 (9th Cir. 1970), *cert. den.* 401 U.S. 912. Instead of directing a Rule 23(e) approval hearing as it had once indicated, the Fifth Circuit took the short cut of dismissing for admitted lack of subject matter jurisdiction. The policy favoring settlements was inapplicable because of the attempt by the consent decree to destroy the rights of unnamed class members.

CONCLUSION

Respondent TWA urges the denial of the certiorari petition.

Respectfully submitted,

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